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6325-39

OFFICE OF PERSONNEL MANAGEMENT

5 CFR PART 534

RIN: 3206-AL01

Senior Executive Service Pay

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing proposed regulations to provide agencies with the authority to increase the rates of basic pay of certain members of the Senior Executive Service (SES) whose pay was set before the agency's senior executive performance appraisal system was certified for the calendar year involved. The proposed regulations would allow an agency to review the rate of basic pay of these SES members and provide an additional pay increase, if warranted, up to the rate for level II of the Executive Schedule upon certification of the agency's senior executive performance appraisal system for the current calendar year.

DATE: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Send or deliver comments to Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415-8200; by FAX at (202) 606-0824; or by e-mail at

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SUPPLEMENTARY INFORMATION: The Office of Personnel Management (OPM) is issuing proposed regulations to provide agencies with the authority to increase the rates of basic pay of certain members of the Senior Executive Service (SES) whose pay was set before the agency's senior executive performance appraisal system was certified under 5 CFR part 430, subpart D, for the calendar year involved. The proposed regulations would allow an agency to review the rates of basic pay set for these SES members, which was capped at the rate for level III of the Executive Schedule, and provide an additional pay increase, if warranted, up to the rate for level II of the Executive Schedule upon certification of the agency's senior executive performance appraisal system for the current calendar year.

The National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136, November 24, 2003) authorized a new performance-based pay system for SES members. Under the new SES pay system, an agency must set and adjust the rate of basic pay for an SES member on the basis of the employee's performance and/or contribution to the agency's performance, as determined by the agency through the administration of its performance management system(s) for senior executives. On December 6, 2004, OPM issued final regulations on the administration of the SES performance-based pay system and prescribed the criteria for establishing and adjusting SES rates of basic pay and paying performance awards (69 FR 70355).

Agencies have had experience administering pay under the new SES performance-based system for 2 years. During this period, we have identified a recurring problem that occurs at the beginning of each calendar year and that prevents an agency from setting pay above the rate for

level III of the Executive Schedule because its senior executive performance appraisal system has not yet been certified for that calendar year.

Under 5 U.S.C. 5307(d), an agency's senior executive performance appraisal system is certified on a calendar year basis. (The regulations in 5 CFR part 430, subpart D, provide the requirements for obtaining certification of a performance appraisal system for senior executives.) Under 5 U.S.C. 5382(b), the maximum rate of the SES rate range may not exceed the rate for level III of the Executive Schedule unless the agency's senior executive performance appraisal system is certified under 5 U.S.C. 5307(d). Therefore, an agency may not set pay for an SES member at a rate above the rate for level III until its senior executive performance appraisal system is certified for the calendar year involved. Since many agencies' senior executive performance appraisal systems are not certified at the beginning of a calendar year, there is a gap from the time an agency may set SES pay above level III (in the previous calendar year) to the time an agency may again set SES pay above level III upon certification of its senior executive performance appraisal system (in the next calendar year).

In one limited circumstance, OPM authorized the extension of provisional certification into the following calendar year—i.e., for the sole purpose of adjusting pay on the basis of official ratings determined during the calendar year for which their appraisal system was certified. (See 5 CFR 430.405(c)(2).) However, this limited exception does not help affected agencies in other situations—e.g., recruiting individuals with superior leadership skills into the SES, reassigning current SES members into positions with substantially greater responsibility, or retaining an SES member who is critical to the mission of the agency—because non-certified agencies may not set SES pay above the rate for level III in these situations. Moreover, the statutory prohibition against adjusting SES pay more than once during any 12-month period

(except in unusual situations as described in OPM's regulations) results in these individuals receiving lower rates of basic pay than individuals in the same situations whose rates of basic pay were or are set during a period when the agency's senior executive appraisal system has been certified.

The requirement in 5 U.S.C. 5307(d) that senior executive performance appraisal systems be certified on a calendar year basis may be changed only by legislation. We are proposing regulations to allow agencies that obtain certification of their senior executive performance appraisal system(s) to review the rates of pay they set earlier in the calendar year for certain SES members and provide an additional pay increase, if warranted, up to the rate for level II of the Executive Schedule. Under this proposal, the determination to provide an additional pay increase could not be made effective before the date the agency's senior executive performance appraisal system is certified under 5 CFR 430, subpart D, or after December 31st of the calendar year for which the agency's system is certified. The additional pay increase would not be considered a pay adjustment for the purpose of applying 5 CFR 534.404(c) (the "12-month rule").

Waiver of 60-Day Comment Period for Proposed Rulemaking

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists to waive the 60-day comment period for general notice of proposed rulemaking. Limiting the comment period for the proposed regulations to 30 days will enable OPM to issue final regulations in 2006, which will give practical effect to these regulations at the earliest possible moment. The final regulations will permit agencies to review the rates of basic pay set previously in early 2006 for SES members and provide an additional pay increase, if warranted, later in 2006 upon certification of the agency's senior executive performance appraisal system.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply to only Federal agencies and employees.

E.O. 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with E.O. 12866.

List of Subjects in Part 534

Government employees, Hospitals, Students, and Wages.

Office of Personnel Management

Linda M. Springer
Director

Accordingly, OPM proposes to amend part 534 of title 5 of the Code of Federal Regulations as follows:

PART 534—PAY UNDER OTHER SYSTEMS

1. The authority citation for part 534 continues to read as follows:

Authority: 5 U.S.C. 1104, 3161(d), 5307, 5351, 5352, 5353, 5376, 5382, 5383, 5384, 5385, 5541, 5550a, and sec. 1125 of the National Defense Authorization Act for FY 2004, Public Law 108-136, 117 Stat. 1638 (5 U.S.C. 5304, 5382, 5383, 7302; 18 U.S.C. 207).

Subpart D—Pay and Performance Awards Under the Senior Executive Service

2. In § 534.404, redesignate paragraphs (c)(3)(v) and (vi) as (c)(3)(vi) and (vii), respectively, add new paragraph (c)(3)(v), and revise paragraph (e) to read as follows:

§ 534.404 Setting and adjusting pay for senior executives.

* * * * *

(c) *12-month rule.* * * *

(3) * * *

(v) A determination to provide an additional pay increase under paragraph (e)(2) of this section when an agency's senior executive performance appraisal system is certified under 5 CFR part 430, subpart D, after the beginning of a calendar year;

* * * * *

(e) *Adjustments in pay after certification of applicable performance appraisal system.*

(1) In the case of an agency that obtains certification of a performance appraisal system for senior executives under 5 CFR part 430, subpart D, an authorized agency official may increase a covered senior executive's rate of basic pay up to the rate for level II of the Executive Schedule, consistent with the limitations in § 534.403(a)(3). The authorized agency official may provide an increase in pay if warranted under the conditions prescribed in paragraph (b) of this section and if the senior executive is otherwise eligible for such an increase (i.e., he or she did not receive a pay adjustment under § 534.404(c) during the previous 12-month period). An adjustment in pay made under this paragraph is considered a pay adjustment for the purpose of applying § 534.404(c).

(2) In the case of an agency that was prevented from establishing or adjusting a rate of basic pay above the rate for level III of the Executive Schedule for an individual upon initial appointment to the SES under § 534.404(a) or for a current SES member using one of the exceptions to the 12-month rule in § 534.404(c)(4)(i), (ii), or (iii) because the agency had not yet obtained certification of its performance appraisal system for senior executives under 5 CFR 430,

subpart D, in the current calendar year, an authorized agency official may increase such a senior executive's rate of basic pay up to the rate for level II of the Executive Schedule upon certification of the agency's senior executive performance appraisal system, consistent with the limitations in § 534.403(a)(3). The authorized agency official may review the previous determination to set or adjust the pay of a senior executive to determine whether, and to what extent, an additional pay increase may be warranted based on the same criteria used for the previous determination. The determination to provide an additional pay increase may not be made effective before the date the agency's senior executive performance appraisal system is certified under 5 CFR 430, subpart D, or after December 31st of the calendar year for which the agency's system is certified. An adjustment in pay made under this paragraph is not considered a pay adjustment for the purpose of applying § 534.404(c) and does not begin a new 12-month period for that purpose.

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